IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 18 OF 2005

AND

SECOND APPEAL NO. 9 OF 2005

SECOND APPEAL NO. 18 OF 2005

1 Audhoot Sardessai,(since deceased by LR's)
(a) Mrs. Suchana M. Kamat, Major
(b) Mr. Mandar Kamat, Major
Residing at Lodha Aqua, Dahisar, Mumbai, Maharashtra.
(c) Mr. Gurucharan A. Sardessai, Major,
(d) Mrs. Shweta G. Sardessai, Major,
Residing at Montvert Selville,
Wakad, Pune, Maharashtra

Amendment carried out as per order dated 29/09/2014

2 Mrs. Audhoot Sardessai,
Both residing at Primavera, S. Ines, Panaji, Goa.

3 M/s. K'vin Incorporation,
a partnership firm with office at Kamat Nagar, S. Ines, Panaji. ...Appellants

V/s.

1 Mateus Octova Maximiano Gonsalves
(now deceased) through his legal representatives:

1(a) Smt. Maria de Fatima da Rocha Gonsalves,

1(b) Mr. Edgar da Rocha Gonsalves,

1(c) Mrs. Maria Angelina Travasso Gonsalves

1(d) Mr. Nelson da Rocha Gonsalves,

1(a) to 1(e) residing at Panaji, Goa.

1(e) Mrs. Sylvia Daisy Sequeria Gonsalves,

1(f) Mrs. Wanda da Rocha Gonsalves,

1(g) Mr. Shrikand D. Vagalkar,

1(f) and 1(g) residing at Vasco da Gama Goa.

2 Charles Dias,

Service,

3 Mrs. Carmen Dias,
both residing at Campala, Miramar, Panaji, Goa. Respondents

SECOND APPEAL NO. 9 OF 2005

1 Charles Dias, Service,

2 Mrs. Carmen Dias,

Both residing at Campala, Miramar, Panaji,
Goa. …. Appellants

V/s.

1 Mateus Octavo Maximiano Gonsalves
(now deceased) through his legal
representatives:

1(a) Smt. Maria de Fatima da Rocha Gonsalves,

1(b) Mr. Edgar da Rocha Gonsalves,

1(c) Mrs. Maria Angelina Travasso Gonsalves

1(d) Mr. Nelson da Rocha Gonsalves,

1(e) Mrs. Syvia Daisy Sequeria Gonsalves,

1(a) to 1(e) residing at Fransmag Building, 1st floor (Above DE JEWEL), Dhempe College, Tonca Road, Miramar, Panaji, Goa.

1(f) Mrs. Wanda da Rocha Gonsalves,

1(g) Mr. Shrikand D. Vagalkar,

1(f) and 1(g) residing at Vasco da Gama Goa.

2 Audhoot Sardessai,

(a) Mrs. Suchana M. Kamat,

(b) Mr. Mandar Kamat, Major

Residing at Lodha Aqua, Dahisar, Mumbai, Maharashtra.

(c) Mr. Gurucharan A. Sardessai, Major,

(d) Mrs. Shweta G. Sardessai,

Both Residents of Montvert Selville, Wakad,

Pune, Maharashtra

Amendment carried out as per order dated 28/11/2014

3 Mrs. Audhoot Sardessai, Both residing at

Primavera, S. Ines, Panaji, Goa.

4 M/s. K'vin Incorporation,

a partnership firm with office at Kamat Nagar,

S. Ines, Panaji. ….Respondents

Mr. P. Rao, Advocate for the Appellant in SA No.9 of 2005

Mr. A.F. Diniz, Senior Advocate with Mr. Ryan Menezes and Mr. Nigel Fernandes, Advocates for the appellants in SA no.18 of 2005.

Mr. M.B. D'Costa, Senior Advocate with Ms. K. Betquecar, Advocate for the respondent Nos.1A to 1G.

Coram:- SMT. BHARATI DANGRE, J.
Reserved on: 21st January, 2021.
Pronounced on : 12th March, 2021.

JUDGMENT :

1. On 15/09/2006, Second Appeal No.18 of 2005 was admitted on the following substantial questions of law:

(B) Whether the findings of Appellate Court are based on no evidence and hence are required to be set aside as being perverse?

(C) The Appellate Court considered the case of the Plaintiffs which was not even as set out in the pleadings. Whether therefore, the Impugned Judgment is liable to be set aside?

(D) Whether the findings given by Appellate Court which are purely based on surmises and conjectures are liable to be set aside?

(I) Whether the Appellate Court was right in holding that the suit is filed within the limitation?

(J) Whether the Appellate Court could have granted specific performance in the facts and circumstance of the case as set out in ground XIV above?

2. On the same date, Second Appeal No.9 of 2005, also came to be admitted as a connected appeal on the substantial questions of law raised in Second Appeal No.18 of 2005.

3. I have heard the learned Senior Counsel Mr. A.F. Diniz with Mr. Ryan Menzes and Mr. Nigel Fernandes, Advocates for the appellant in Second Appeal No.18 of 2005 and Advocate Mr. Parag Rao for the Appellant in Second Appeal No.9 of 2005. The respondent in both the appeal is represented by the learned Senior Counsel Mr. M.B. D'Costa, who is assisted by learned Advocate Ms. K. Betquecar.

4. The plaintiff, Mateus Octavo Maximiano Gonsalves, instituted a suit for specific performance for execution of an oral agreement entered into with Defendant No.3 M/s. K'vin Incorporation, a partnership Firm of Defendant Nos.1 and 2. The plaintiff claimed to

be the owner of the property consisting of plot No. A/7 of La Campala Colony situated at Campal, Panaji, Goa. In the plaint, it is pleaded that somewhere in the month of May or June, 1981, the plaintiff entered into oral agreement with the defendants for sale of undivided two third share of the plot in consideration of the defendants constructing a building on the said plot and handing over to the plaintiff the entire ground floor of the said building which would comprise of ground plus two floors. It was agreed that the plaintiff would sell the two third of the undivided share either to the defendant or his nominees and the plaintiff would not have to pay anything towards cost of the construction of the flats and the consideration would continue to remain constant irrespective of any increase or decrease in the cost of construction. The defendant undertook to prepare all the plans for construction and obtain necessary approvals in form of permissions without any liability being cast on the plaintiff.

5. The case of the plaintiff as pleaded in the plaint is that in terms of the oral agreement the price of the flat admeasuring about 55 square metres would be taken as its cost of construction which was agreed to be ₹1400/- per square metre and that the price to be paid to the plaintiff would be ₹450/- for every square metre of the plot, considering the plaintiff would retain himself one third right to the soil. During the period of construction the plaintiff decided to convert one

room of the flat No.G-2 into a distinct and separate shop for which necessary approvals were obtained and the portion was converted into a shop. When the building become ready one flat on ground floor was handed to the plaintiff being flat No.G-1 and the shop was also handed over but the rest of the portion of flat No.G-2 continued with the defendants as the plaintiff was assured that it would be handed over to him the time of execution of the Deed of Sale. This happened precisely on 15th August, 1985. Subsequent thereto when the plaintiff noted that the flat G-2 was being occupied by some persons, he objected and he was informed that the occupants were the defendant's friends and after their short stay the flat would be made over to him. However, the flat was never handed over and this constrained the plaintiff to aver that the cause of action arose on 19th December,1986 when the defendant replied through their Counsel that they were not willing to abide by the oral agreement.

In the suit, the plaintiff sought the relief of being put in full possession of the entire flat on the ground floor.

6. In the written statement, the defendants specifically denied any agreement for Sale of undivided two third of plot or for handing over the entire ground floor of the building with two flats therein. On the contrary, it is pleaded that the plaintiff and his wife agreed to convey the plot in favour of the defendants or their nominees for a

consideration of ₹1,94,400/- and the plaintiff and his wife had agreed to purchase the entire ground floor of the new building at the price of ₹1,54,070/- rounded to ₹1,54,000/- per flat i.e. @₹2,170/- per square metre by adjusting the price of the entire land admeasuring 432 square metre @₹450/- per square metre i.e. ₹1,94,000/- in total and for paying the balance in cash. The case pleaded by the defendants is that the price of the plot shall be ₹1,94,400/-. to be paid by defendant Nos.1,2 and 3 by way of built up area but since the total price of total built up area of the ground floor would be more than the price of the flat, the plaintiff and his wife agreed to reimburse the defendants by paying the difference in cash. It is then pleaded when the construction was going, the plaintiff and his wife had a second thought, in view of the financial constraints faced and instead of two flats, proposed to purchased only one flat and a shop of 14 square metre, which would make up the sum of ₹1,94,400/-, otherwise there would have been a difference of ₹1,13,600/- between the cost of built up area to be delivered to the plaintiffs and the price of land to be sold the defendants and his nominees and this amount would have been required to be paid in cash. It is specifically denied that the agreement was for delivery of two flats of 55 square metres each and the agreement was subsequently modified for delivery of one flat of 71 square metre and a shop of 14 square metre only.

7. The defendant Nos.4 and 5 in the suit, who are the appellants in appeal No.9 of 2005 took a stand that they are bonafide purchasers of flat No.G-2 on the ground floor of the building for total consideration of ₹1,39,000/-, pursuant to an agreement for Sale dated 06/09/1982 for an area of 57 square metres in form of flat No.G-2, they came in possession of the said flat, the entire consideration of the flat being paid to defendant Nos.1 to 3.

8. The Civil Judge Senior Division by referring to the oral agreement between the parties relied upon the evidence rendered before it and did not accept the case of the plaintiff that the agreement was for sale of undivided two third share of property belonging to the plaintiff and also rendered a finding that the plaintiff has not proved that the agreement contemplated handing over of the entire ground floor consisting of two flats in the plan annexed to the plaint. The Court also exhaustively dealt with the issue of cost of construction and did not find merit in the version of the plaintiff. Further the claim of the plaintiff that they were entitled to carpet area of 55 square metre was found to be not tallying with the description of the flats on the ground floor, the factual position being flat G-1 is admeasuring 71 Square metre and the suit flat G-2 is of 57 square metre. Recording that the admitted cost of the plot is ₹1,94,000/- and the price of the flat and shop comes to ₹1,84,000/- with further provision of shutter, gate to the compound and

the furniture to the extent of ₹10,000/- to cover up the consideration of the plot as per version of DW1 (Defence witness No.1) to be more probable, in support the case of the defendants than that of the plaintiffs. The plaintiff was held not entitled for specific performance in the wake of sub-section (1) of the Section 20 of the Specific Relief Act, which entitle a party for specific performance but the said relief being discretionary, the guiding principles were extensively discussed and the discretion as prayed for was refused as the case set out by the plaintiff was based on incorrect facts being pleaded and by relying on the principles that one who seek equitable relief must come with clean hands, the discretion vested in the Court under Section 20 of the Act, was refused.

9. On the issue no.5, about the right of the defendant No.4 and 5 who occupied the remaining portion of flat no.G-2 and whether they are trespassers, the Trial Court declared them to be the bonafide purchasers of the suit flat, in absence of anything to the contrary being proved by the plaintiff. Holding that the occupancy certificate brought on record was granted on 07th June,1984 and when the defendant no.4 and 5 pleaded that they were put in possession of flat G2 in July,1984 whereas for the first time the plaintiff raised objection about their possession in their notice issued on 05th December, 1986, the claim of the plaintiff qua defendant no.4 and 5 was found to be without any

merit. Since the plaintiff had accepted the possession of the flat and shop admeasuring 14 square metres in 1985, in absence of willingness to execute the conveyance on his part on getting the suit flat, the plaintiff was held to be estopped from claiming specific performance of the agreement which otherwise also they had failed to prove. Resultantly, the suit of the plaintiff came to be dismissed.

10. In an appeal preferred to the Additional District Judge, Panaji, the judgment and order passed by the Trial Court came to be reversed and the defendants were directed to put the plaintiff in possession of the suit flat G-2 on the ground floor excluding the area of 14 square metres which is the area of shop which was already in possession of the defendants. The First Appellate Court held the existence of the agreement and its stipulations pleaded by the plaintiff in the plaint to be proved by formulating three predicates being; predicate (a) that only two third of the plot was agreed to be sold, predicate b) that the plaintiff was entitled for entire ground floor comprising of two flats of 55 square metres each and Predicate (c) cost of construction was ₹1400/- per square metre.

Holding that the plaintiff's case was based on an agreement contemplating that the plaintiff agreed to sell undivided two third share of the plot to defendant Nos.1, 2 and 3 whereas the case of the defendant being the plaintiff had agreed to sell the entire plot to the defendants. The Appellate Court recorded as under :-

> *"In view of this admitted position by defendant No.1when the agreement was concluded, the owner was to keep two flats on the ground floor and consequently would be entitled on 1/3rd share in the entire plot. Under the contract, the plaintiff as owner of the plot was required to sell undivided 2/3rd share in the plot to the defendants or his nominees. It is admitted by defendants that these nominees would be the purchasers of the flat to be constructed in the building. Each purchase would only be entitled to undivided share in the plot corresponding to the area of flat purchased by him. It is admitted that plaintiff as purchaser of two flats corresponding to 1/3rd of the total number of flats, would become owner of 1/3rd undivided share in the plot. If entire plot was agreed to be sold to be defendants 1 to 3, these defendants would again have to re-sell 1/3rd undivided share in the plot to the plaintiff. Since the plot was not sold and the undivided rights in the plot were to be sold by the plaintiff to the nominees/ purchasers of the flats, ultimately, it would mean that plaintiff will sell to himself 1/3rd undivided share in the plot at the time of execution of the sale deed. This is fallicious and illogical. Owner cannot sell to himself any property. This would also involve double payment of stamp duty which no person would agree to. Only logical agreement that can be arrived at between the parties, in the circumstances, is that plaintiff would retain ownership to 1/3rd undivided share in the plot and in consideration to the 2/3rd undivided share, the defendants 1 to 3 would construct two flats for the plaintiff. Irresistible conclusion from the above discussion would be that plaintiff had agreed to sell only 2/3rd undivided share in plot A-7 to defendants 1 to 3."*

11. On the cost of construction, the Appellate Court shifted the burden upon the defendant to prove the cost of construction since it was matter within their exclusive knowledge. The Appellate Court in its judgment has precisely framed and recorded it as under:

> *"These defendants, however, have specifically pleaded what was the agreed cost of construction, in written statement it is only stated that the actual cost of construction in 1998 was more than Rs.1,400/- per sq.mtr. It is not in dispute that defendants 1 to 3 were in business of construction. It is nobody's case that plaintiff was in business of construction. These defendants being in the line of construction ought to have known what was the cost of construction at the relevant time, and therefore, ought to have pleaded and proceed the same. In the written statement defendants 1 to 3 have pleaded as under. It was specifically agreed "at that time that plaintiff and his wife would pay to the defendants, the difference between the total price of the land and total cost of construction of said two flats." The agreement was, therefore, admittedly to adjust price of the land with cost of construction. It was, therefore, necessary for defendants to plead and prove what was the cost of construction since defendants have denied that cost was agreed at Rs.1,400/-. These defendants have pleaded that plaintiff and his wife had agreed to purchase the ground floor at the price of Rs.1,54,000/- per flat at the rate of 2170/- per sq. mtr. Since this is a specific averment made by the defendants, defendants ought to have proved the same."*

12. The Appellate Court further record that since the plaintiff was not involved in the business of construction and therefore did not have any data of what could be the cost of construction and the figure of ₹1400/- arrived at by using the formula projected by the plaintiff cannot be said to be not based on the evidence and unrealistic and recorded: "There is no reason to disbelieve the case of the plaintiff that the cause of cost of construction of ₹1400/- arrived at on the basis of facts which are on record". Recording that the defendants have relied on the plans of the building but have not produced the same in evidence and if produced it would have shown area of each of the flats in possession of the defendants and drew an adverse inference against the defendant nos.1, 2 and 3. On the rights of the defendant nos.4 and 5, the Appellate Court again proceeded on same assumption and one being the date of occupation of the shop by the defendant and following logical conclusion from appreciation of the evidence that the defendent nos. 4 and 5 occupied the flat after the plaintiff occupied the flat but before the plaintiff occupied the shop with further assumption that handing over possession of the shop does not necessarily mean that the plaintiff had occupied the same. On the plea of the defendant that they were the transferee for value in good faith and without having a notice of oral agreement between the plaintiff and defendant nos.1, 2 and 3, the burden is again shifted by the Appellate Court on the defendant nos.4 and 5 to establish the said plea and in the absence of them stepping in

the witness box it is held that they have failed to discharge the burden which makes the plaintiff entitled to claim specific performance of contract against the defendant nos.4 and 5 also. With these reasoning being set out in a pleonasm manner, the suit is decreed by the Additional District Judge, Panaji in an appeal.

13. It is this judgment which is assailed by the defendant nos.1, 2 and 3 to the suit in Appeal No.18 of 2005 and by defendant nos.4 and 5 in no.9 of 2005.

Mr. Diniz, learned Senior Counsel is extremely critical of the manner in which the Appellate Curt has recorded its findings based on conjectures and surmises, on the aspect of the terms of the agreement and also on the aspect of price of construction. The learned Senior Counsel also urge that the plaintiff has to establish his case by standing on his own feet and when he come before the court seeking specific performance by raising pleadings, he must establish the same by bringing on record evidence in support and cannot take benefit of the weakness of the case of the defendant and according to Mr. Diniz, the First Appellate Court has clearly erred where it has shifted the burden on to the defendant. Submitting that specific performance is a discretionary relief and the court ought to have considered the conduct of the plaintiff and at this stage when no flat of 55 square metres is available, according to Mr. Diniz the relief sought is not for specific performance but what is sought and granted is a mandatory order.

Mr. Rao, learned Counsel for the appellant in appeal no.9 of 2005 would join Mr.Diniz in his submission that one who seeks the discretionary relief under the Specific Performance Act must approach in a fair manner. By inviting my attention to paragraph 10 of the plaint Mr. Rao contend that the plaintiff had specifically pleaded that the flat and shop were handed over to the plaintiff around 15th August 1985. Further in his notice addressed to the defendant Nos.1 and 2 the plaintiff had categorically stated that though a period of three years had lapsed from the time when the promise was made to arrange for the second flat to be vacated, still the flat continued to be occupied by the same persons. Mr. Rao urged that he has specifically pleaded that he was put in possession of the said flat pursuant to the agreement of sale. Mr. Rao would also rely on the occupancy certificate issued by Panjim Municipal Council on 7^{th} June, 1984 where the area of occupation is described as 387.74square metres of carpet area.

14. Per Contra, the learned Senior Counsel Mr. Costa rely on the floor map which is an approved one. His submission is, the agreement executed with the defendant was based on the simple proposition that being owner he retained one-third of the said plot and

allowed development over two third of the plot, and the developer should give him two flats on the ground floor. The learned Senior Counsel urged that this was a simple agreement as per the understanding of a layman with a mighty builder. He would further submit that since the relationship between the parties was cordial, no written agreement was executed and to the extent that when the plaintiff saw the remaining portion of the flat G2 being occupied by some strangers and was told that his friends were occupying, he believed the same. Mr. Costa further submit that the defendant no.1 had admitted the novation of the first agreement but he would submit that it was not so permissible unilaterally and there is no question of the terms of the earlier agreement being replaced by such novation. As regards right of the appellant in Appeal No.9 of 2005, Mr. Costa would submit that the defendant no.4 and 5 did not ever take a plea that they are bonafide purchasers and did not even bother to step into the witness box. He would submit that the shop in question was used by the husband of the plaintiff till is death but nothing was done by the defendant nos.1,2 and 3 to obtain approval for the said shop which is carved out of flat no.G2.

15. The claim of the plaintiff seeking specific performance is based on an oral agreement stipulating terms as agreed between the parties which on its execution must result into a valid and binding contract. In order to create a binding effect, both the parties to the

agreement should be ad-idem on its terms and the burden in such a case is on the plaintiff, particularly when the defendant has raised the dispute about the terms of the agreement. It is only when there is a valid and enforceable contract entered into between the parties, the Court would be in a position to order specific performance of an obligation contained therein. The stipulations and terms of the contract have to be cortain and parties must have been consensus ad idem. When the parties are not ad idem, there can be no relief of specific performance since there is no contract at all. Qua the terms of agreement which are not mutually agreed between the parties and the parties are at variance, the court will not grant a specific performance of contract. The Apex Court in case of **Mayavanti versus Kaushalya Devi** [1990 3 SCC 1] dealing with a suit for specific performance of the contract where there was no consensus of the term has held as under:

> *8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise*

> *valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation."*

16. The burden is upon the plaintiff to plead that the agreement between the parties was based on a consensus and he should also establish that in order to be a binding contract it was agreed upon by the defendant. The plaintiff himself has pleaded in the plaint that he would sell two third undivided share in plot No.A7 to the defendants or their nominees and the plaintiff would not be required to pay anything towards the cost of construction of the ground floor of the building which consists of two flats. In his deposition before the Court he come with a case that he will retain ownership of one third of undivided right in the plot and the defendant agreed to construct two flats for his right to one-third share. He has further deposed that the defendant no.1 had agreed to construct about 4 flats corresponding to his undivided right and that he had to pay nothing to the defendants for the two flats agreed to be given on the ground floor in exchange of transferring two third of the rights to the suit plot in favour of the defendant no.1. In the plaint there is no mention of any carpet area of the flat and on the contrary it is pleaded that the oral agreement was to the effect that the price of the

flats admeasuring 55 square metres would be taken as its cost of construction agreed at ₹1400/- per square metre and the price to be paid to the plaintiff would be ₹450/- for every square metre of land considering that the plaintiff would retain for himself one-third rights to the soil. However, in the deposition before the Court the area of the two flats came to be mentioned as 55 square metre of carpet area, which was never a case in the pleadings. The plaintiff also admitted that while the construction was in progress he sought necessary changes to one of the flats on the ground floor and he was put in possession of one flat and one portion of the ground floor which was converted into a shop on 15th August, 1985. This was proposed since he thought that on his retirement he intend to have one shop but the pleadings are conspicuously silent on the said aspect and there is a deviation on the material aspect. The Trial Court rightly appreciated the evidence and the case being put up for the first time before the Court which was not the basis of the claim set out in the plaint. The Appellate Court has assumed existence of certain clauses of the agreement, while it proceed for determination of the point as to whether the plaintiff had proved existence of the agreement between the plaintiff and defendant nos.1, 2 and 3.

17. The question itself is wrongly projected as there is no dispute about the fact that an agreement do exist but the whole dispute

revolve about the terms of agreement. The agreement being an oral agreement and the plaintiff had pleaded that they wished to sell undivided two third share of the plot to the defendants, the price of plot being fixed at ₹450/- per square metre. In consideration of the same defendants were to construct a building in the said plot, and handover the ground floor comprising of 2 flats to the plaintiff, the cost of construction of the said flat being ₹1400/- per square metre. There is no dispute about the contention of the plaintiff to this effect and also to the further aspect of the matter that the plaintiff would not to be required to pay anything towards the cost of construction of the flats and the consideration would continue to remain constant irrespective of any increase or decrease in the cost of construction. The bone of contention was about four predicates a) that only two third of the plot was agreed to be sold b) cost of plot was ₹450/- per square metre c) cost of construction was ₹1400/- per square metre and d) two flats having carpet area of 55 square metres were agreed to be given to the plaintiff in return of the two third area of the plot.

The second predicate being admitted by the defendant that the plaintiff ought to have discharge the burden as to the remaining three predicates. About the predicate that only two third of the plot was agreed to be sold and not the entire plot, the plaintiff has deposed that the agreement was entered into for construction of a building on the plot belonging to him and he would retain one-third of the undivided right in the plot whereas the defendant would have ownership of two third of the undivided plot. Qua his right of one-third of the plot, the defendant would construct 2 flats for him on the ground floor as 4 flats to be constructed on the upper floor commensurating with the two third of the undivided interest. The plaintiff clearly understood the said term of the agreement of having two flats in exchange for transferring the two third rights in the suit plot in favour of the defendants, on construction being carried out. The two flats to be handed over to him on the expiry of five years from the date of agreement.

18. The defendant nos.1, 2 and 3 pleaded in their written statement and also took a specific stand that the entire plot was agreed to be sold. Merely because the word "undivided share of the land" has been used, two flats which constructed on one third of the total plot could not be considered to covenant against the plaintiff. The Appellate Court without any evidence on record twist the term "undivided share", see a fallacy in the plaintiff selling to himself one third undivided share in the plot at the time of the execution of the sale deed and assumed certain terms of the agreement to make it appear as logical and modify the terms of the agreement to the effect that the plaintiff would retain ownership to one-third undivided share and in consideration of two third undivided share the defendant no.1 would construct 2 flats to the plaintiff and therefore the fallout is only two third was agreed to be sold

to the defendants. The case of the defendant is that as per the agreement if the plaintiff agreed to sell the plot to the defendant for a fix consideration of ₹1,94,400/- and they agreed to purchase the ground floor at the price of ₹1,54,000/- per flat at the rate of ₹2170/- square metre by adjusting the price of the entire land of 432 square metres which was approximated to ₹1,94,400/-i.e. 450/- per square metre. Thus the price of plot, the plaintiff was to get ₹1,94,400/- but for construction of two flats the price would come as ₹1,54,000/- per flat @ ₹450/- per square metre. The cost of construction which has been pleaded by the plaintiff to be ₹1400/- per square metre was in fact specifically denied and since the price difference between the price of plot of land and cost of construction of two flats would be substantial, the plaintiff proposed to settle for one flat and another portion of second flat which was agreed to be converted into a shop admeasuring 14 square metre within the permissible cost of ₹1,94,400/- which was the price of the entire plot of 432 square metres. The defendant has brought on record an agreement entered into between one of the purchaser of the defendant no.3 dated 2nd November 1981 where a flat no. F2 of an area of 70.00 square metres is agreed to be purchased for consideration as described in the schedule of payment which is rounded off to ₹1,34,000/-, to be adjusted in different stages. The cost of each of the flat in the building according to the defendant was fixed as ₹1,54,000/- and this would have accommodated one flat and one small portion to be adjusted against the total cost of plot which was agreed being ₹1,94,000/-. For the ground floor the rate of the flat was determined as ₹2170/- per square metre. For two flats on the ground floor, plaintiff was to arrange for the remaining amount which would work out to ₹1,30,000/-. Instead the plaintiff agreed for one flat and one shop to the tune of ₹1,84,000/- and the difference of ₹10,000/- to be adjusted towards making necessary changes for conversion of portion of flat to shop. The defendant has categorically admitted that as owner he would have been entitled for undivided share of the land in the built up area to be constructed. The shop was created by using one room of the second flat since the plaintiff was held entitled for only that much area commensurating with the price of the plot being agreed as ₹1,94,000/-. The occupancy certificate undisputedly is without any mention of shop since the purpose of occupation was reflected as purely "residential" and the parameters for permitting a commercial shop in the residential building would have been quite distinct and therefore the plaintiff continued to run the shop without necessary permissions from the Municipal Council is apparent.

19. The Appellate Court however took the exercise of reworking the calculation based on the assumptions and the premises and in absence of material borne on record, which resulted in perverse finding. The plaintiff has failed to prove that he was entitle for two flats

of 55 square metres each and the calculation which is based on the said premise at the hands of the Appellate Court cannot justify its relevancy. The Appellate Court proceeds on the cost of construction per square metre whereas according to the defendant the price of each flat was arrived as ₹1,54,000/- that is at the rate of ₹2,170/- per square metre. The Appellate Court has shifted the burden on the defendants to establish the cost of construction on the premise that they are into the business of construction activity. The plaintiff has never pleaded about the carpet area and the defendants have also proceeded on the basis of built up area. The area of 55 square metres which is the basis of plaintiff case has been goofed up to be an area of 57 square metre. The Appellate Court has therefore rendered the finding based on no evidence and considered the case of the plaintiff which was not even set out in the pleadings, resulting into a perversity.

20. As regards the substantial question of law whether the specific performance could have been granted in favour of the plaintiff, it is to be noted that the remaining portion of the flat has been directed to be handed over to the plaintiff in ignorance of the claim of the defendant nos. 4 and 5 who were the bonafide purchasers. The plaintiff in fact has sought for specific performance and the Appellate Court granted him mandatory order of being put in possession. The plaintiff

has however not performed his part of the agreement, to transfer the plot and therefore the discretionary relief of specific performance ought to have been refused to the plaintiff since he did not approach with clean hands and failed to prove readiness and willingness to perform his part of the agreement.

21. Normally a suit for specific performance of an agreement for sale of immovable property involves the questions; (1) Whether the plaintiff was ready and willing to perform his part of the contract in terms of Section 16 of Specific Relief Act, (2) Whether it was a case for exercise of discretion by the Court to decree specific performance in terms of Section 20 of Specific Relief Act and 3) Whether there were delay and latches on part of plaintiff in approaching the Court to enforce Specific Performance of Contract. A finding on three aspects above, would depend on appreciation of pleadings and evidence on record. The said questions are not pure questions of facts but also involve substantial questions of law and whether the Court has exercised discretion in accordance with law is a question of law, that substantially affect right of parties in the suit.

Question of law framed vide Question Nos.(B), (C), (D), (J) are stand answered in the affirmative.

As far as question of law No.(I) is concerned, no issue was framed by the Trial Court on the point of limitation, nor was limitation framed as a point for determination by the Appellate Court. Hence, question of law No.(I) framed has no foundation in the judgment of two Courts below, as an issue and hence do not arise in this appeal.

22. As a result of aforesaid discussion and the substantial questions of law answered above, both the Appeals vide Second Appeal No.18 of 2005 and Second Appeal No.9 of 2005 are allowed. The judgment dated 04/09/2004 of District Judge, Panaji is set aside. Judgment and Decree dated 30/10/2001 of Civil Judge, Senior Division, Panaji is confirmed. Decree be drawn accordingly.

BHARATI DANGRE, J.

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